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TIMOR GAP: THE LEGALITY OF THE "TREATY ON THE ZONE OF COOPERATION IN AN AREA BETWEEN THE INDONESIAN PROVINCE OF EAST TIMOR AND NORTHERN AUSTRALIA"

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I. Day of Infamy in East Timor

On 7 December 1975, the thirty-fourth anniversary of the day of infamy at Pearl Harbor, Indonesian forces invaded the territory of East Timor, a Portuguese colony for some four and a half centuries. Following the 1974 Portuguese revolution, East Timor, like other Portuguese non-self-governing territories, had been moving through a process of self determination. Portuguese authorities evacuated the territory in August 1975 during civil disorders, condoned, if not fomented by the Indonesians.

FRETILIN,[1] a popular group which aimed at independence for the territory after a short transitional period, gained the upper hand in the struggle and, on 28 November 1975, declared independence hoping this would strengthen their hand in dealing with Indonesian border incursions. A full-scale Indonesian invasion followed. One might have thought that this was a plain breach of the norms of the United Nations Charter concerning the illegal use of force and self determination.[2] Indeed, at the United Nations, the General Assembly and the Security Council both adopted resolutions[3] deploring the Indonesian actions, reaffirming the right of the Timorese to self determination and calling for the withdrawal of the Indonesian forces. The political will has never been there to put teeth into these resolutions,[4] but the United Nations continues to treat Portugal as the legal administering power of the territory and the General Assembly has specifically rejected the claim that East Timor has been legally integrated into Indonesia.[5]

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[1] Frente Revolucianaria de Timor Leste Independente.

[2] See generally Clark, The "Decolonization" of East Timor and the United Nations Norms on Self-Determination and Aggression, 7 Yale Journal of World Public Order 2 (1980)

[3] G.A. Res. 3485 (XXX), 30 U.N. GAOR, Supp. (No.34) 118, U.N. Doc. A/10034 (1976); S.C. Res. 384, 30 U.N. ESCOR, Resolutions and Decisions 10, U.N. Doc. S/Res./384 (1975).

[4] Although the matter refuses to go away. Note the recent widespread coverage of the 12 November 1991 massacre by Indonesian troops in Dili, the capital of East Timor. See, e.g., "The Talk of the Town," The New Yorker, December 9, 1991.

[5] In July of 1976, Indonesia purported to annex the territory. The General Assembly rejected this claim, inasmuch as the people of the territory had been prevented from freely exercising their right to self determination. G.A. Res.31/53, 31

II. The Timor Gap

The continental shelf area between northern Australia and East Timor is believed to contain oil. Exploiting the area has been complicated by the difficulty of delimiting boundaries, given conflicting claims and sharp disagreement about the applicable legal principles. Prior to 1975, Australia had some inconclusive negotiations with the Portuguese on the subject. More recently, the discussions have taken place with the Indonesians. The essence of the problem is that while the width of the sea in the relevant area between the two coastlines varies from some 250 to 290 nautical miles, there are. geographically-speaking, two continental margins between the two land masses, a more than 200 nautical mile Australian margin to the south and a 40 to 70 nautical mile margin to the north, separated by a deeper area, known as the Timor Trough. The issue is what are the legal implications - if any - of the shape of the shelf or shelves. Australia has argued essentially that it is entitled to the full natural prolongation of its shelf to the edge of the margin, while Portugal and Indonesia have argued that, since it is not possible to accomodate a full 200 mile shelf for both Timor and Australia, the median line of the shelf (ignoring the trough) is where the boundary should be. The law on such delimitations has been evolving in the past two decades and is still far from clear. Both Australia and Portugal are parties to the 1958 Geneva Convention on the Continental

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U.N. GAOR, Supp. (No.39) 125, U.N. Doc. A/31/362 (1976).

Shelf,[6] so that as between them, that Convention should provide the framework for a delimitation. The result of such an exercise is far from predictable.[7] Indonesia, while it signed the 1958 Convention, has not ratified it. It presumably argues that the relevant rules are those of customary law developed under the aegis of the 1982 Convention on the Law of the Sea.[8] This approach, especially when account is taken of the development of the concept

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[6] 449 U.N.T.S. 311. Art. 6 (1) provides :

> Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite to each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of such agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

[7] Australia would argue that there are two shelves - not one that is the "same". Portugal would argue for the equidistance rule. Contemporaneously with an Application to the International Court of Justice concerning the Timor Gap Treaty, infra note, Portugal insisted that Australia continue efforts to negotiate a delimitation of the shelf with Portugal by application of the 1958 Convention. See Letter handed on 22 February 1991 to the Minister of Foreign Affairs of Australia by the Ambassador of Portugal at Canberra, in U.N. Doc. A/46/97 (1991).

[8] U.N. Doc. A/CONF. 62/122 (1982). Art. 83's "non-rule" on the subject provides that "The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution." And see the extended definition of the shelf in Art. 76 (1): "...or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

of Exclusive Economic Zones,[9] would suggest that some kind of median line should probably be drawn - the force of the Australian argument based on there being "two" shelves as a result of the geographic features, appears to have weakened in the more recent practice.[10]

In 1971 and 1972 Indonesia and Australia agreed to a shelf boundary between them to the west and the east of East Timor, since no one at that point disputed that it was Portuguese territory.[11] The agreed line tracked the shelf edge along the Timor Trough essentially in accord with the Australian position - Australia did much better than Indonesia in terms of area in this deal. Indonesia has apparently since regretted its generosity. The hole in the line of delimitation is known popularly as "The Timor Gap." It is in this context that Australia and Indonesia entered into

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[9] Indonesia lays general claim to a 200 mile EEZ. Arts 56 and 57 of the 1982 Convention appear to permit claims to be made over the sea-bed in an exclusive economic zone of up to 200 nautical miles, regardless of the shape of the shelf. They may well supersede some of the earlier legal notions of the continental shelf - but it is all very uncertain.

[10] See Case Concerning the Continental Shelf, Libyan Arab Jamahiriya/Malta, [1985] I.C.J. 6, 56 "Each coastal State is entitled to exercise sovereign rights over the continental shelf off its coasts for the purpose of exploring it and exploiting its natural resources...up to a distance of 200 miles from the baselines - subject of course to delimitation with neighbouring States - whatever the geophysical or geological features of the sea-bed within the area comprised between the coast and the 200-mile limit." But see the separate opinions of Judges Sette-Camara at 61-62 and Valticos at 105. They perhaps see the Timor Trough as exceptional, although their argument is obviously influenced by viewing the 1971-72 Indonesian-Australian agreements as state practice - practice, as it turns out, Indonesia came to regret.

[11] See 10 I.L.M. 830 (1971); 11 I.L.M. 1272 (1972); 12 I.L.M. 357 (1973).

what is titled the "Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia"[12] ("the Treaty"). The Treaty was signed on 11 December 1989 and subsequently ratified by the two parties.[13] The Treaty describes itself as a "provisional" solution to the problem.[14] The disputed zone has been divided along the lines of the map which is reproduced on page 00. You will notice that the relevant part of the shelf between East Timor and Australia ("the Zone of Cooperation")[15] has been divided under Articles 3 and 4 of the

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[12] The Treaty is reproduced in 29 I.L.M. 469 (1990).

[13] The exploitation is now continuing apace, notwithstanding the uncertainties caused by the Portuguese case, infra note. On 12 December 1991 the Australian federal Minister for Resources announced that eleven production sharing contracts with oil companies had been aprroved for exploration in Area A of the Zone of Cooperation. Media Release, [Australian] Minister for Resources, DPIE91/320G.

[14] See first preambular paragraph and Article 33 of the Treaty. "Provisional" in this case means a minimum of forty years, subject to renewal for 20 year periods. Id. According to a note issued by the Australian Department of Foreign Affairs and Trade, January 1990 "Australia continues to assert sovereign rights over the seabed extending to the geomorphological edge of the natural prolongation of Australia's continental shelf, marked by the Timor Trough i.e. slightly to the north of the Zone of Cooperation."

[15] Onorato & Valencia, International Cooperation for Petroleum Development: The Timor Gap Treaty, 5 ICSID Rev. For. Invest. L.J. 1 (1990)at 5, decribe the area thus:

> The Zone is delineated on the northern side by a simplified bathymetric axis line; on the southern side by a 200nm line measured from the Indonesian archipelagic baselines; on the eastern and western sides by equidistance lines. Thus both States conceded the extreme boundary claims of the other and presumably the principles on which they were based. These equidistant lines are determined by the former relationships between the coasts of Indonesia and Portuguese Timor. The northern limit of the coffin-shaped Zone is a simplified line marking the axis of the Timor trough. The southern

Treaty into three "Areas." One, Area A (the darkest shading) is to be jointly developed. Area B is an area of sole Australian jurisdiction, but Australia will allocate 10% of gross Resource Rent Tax revenues equivalent to 16% of net Resource Rent Tax collected from this area to Indonesia. Area C is an area of sole Indonesian jurisdiction but Indonesia will allocate 10% of Contractors' Income Tax revenues from this area to Australia. The whole deal - A, B and C - obviously comes as a package and the resources of the total package are thus subject to sharing.

III. Illegality of the Treaty

My object here is to expand upon a view that has been espoused by the Government of Portugal in various protests to the Australian authorities and to the United Nations,[16] and which I have previously addressed in outline[17]: The Australian Government has acted in breach of its international obligations in entering into the Timor

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limit lies 200nm from the coast of Timor. The two other intermediate lines that separate the three areas are a straight line in the general vicinity of the 1,500 meter isobath and median lines between Australian and Indonesian territories.

[16] See, e.g., Letter dated 10 November 1988 from the Permanent Representative of Portugal to the Chairman of the Special Committee on Decolonization, U.N. Doc. A/AC.109/981 (1989).

[17] See my Submissions to the Senate Standing Committee on Foreign Affairs and Defence (Reference: East Timor), Commonwealth of Australia, Official Hansard Report 1388, 1400 (1982); Letter to Gordon McIntosh, Senator for Western Australia, 27 February 1986. I was assisted in honing my views by exchanges with Sasha S. Stepan during the writing of her excellent monograph entitled Credibility Gap: The Timor Gap Agreement and its International Implications (1990).

Gap Treaty[18] with Indonesia. I believe, moreover, that this Treaty is null and void under international law and that, if properly seized of the issue,[19] the International Court of Justice would so

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[18] It is not my purpose here to criticize the details of the arrangements. Were the Treaty validly entered into with a party which - unlike Indonesia - had legitimate status to cut the deal, it would certainly seem to be a creative solution to an awkward boundary problem. See generally, Onorato & Valencia, supra note. In this Article, I am interested instead in the legitimacy of the whole enterprise. On principles of delimitation in such cases, see generally Catriona Cook, The Australia-Indonesia Maritime Boundary, Occasional Papers in Maritime Affairs 40 (1985). On the Treaty, see also Smart, Timor Gap Zone of Cooperation, 1990 The APEA (Australian Petroleum Exploration Association) Journal 386, Suter, Oil in Troubled Waters, Inside Indonesia, December 1988, at 7.

[19] As in a case brought by Portugal, or some time in the future by an independent East Timor. Litigating all the issues is complicated since, while Australia and Portugal have made declarations accepting the jurisdiction of the Court, Indonesia has not. Portugal in fact instituted proceedings against Australia in the International Court on 22 February 1991, making a somewhat different case than mine. I have a copy of Portugal's Application but not its initial Memorial. In the way in which it has presented the issue, Portugal does not need to assert the invalidity of the Timor Gap Treaty or to stress the duty not to recognize the acquisition of territory obtained by force. Instead, it emphasizes Australia's obligation not to act contrary to the duties of Portugal as administering power, and the interests of the people of the territory. Para. 1 of the Application reads:

> 1. The dispute relates to the opposability to Australia: (a) of the duties of, and delegation of authority to, Portugal as the administering Power of the Territory of East Timor; and (b) of the right of the people of East Timor to self-determination, and the related rights (right to territorial integrity and unity and permanent sovereignty over natural wealth and resources).
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> Portugal maintains that, in its capacity of administering Power within the meaning of Article 73 of the Charter, it is performing an international public service and that, so long as the United Nations has not discharged it from its responsibility, it is invested with the corresponding duties and powers, which continue to be opposable, as do the rights of the people of East Timor, erga omnes, and in particular to all the member States of the United Nations and hence to Australia.

decide. Needless to say, in making this case, I do not mean in any way to minimize the blatant illegality of Indonesia's aggression against, and denial of self-determination to, East Timor. I have, indeed, addressed that issue at length elsewhere.[20] The illegality of Indonesia's actions are, I believe, not disputed by the Australian authorities[21] and they have, of course, been duly noted in resolutions of the Security Council and the General Assembly. One of the many tragedies of the Timor situation is, however, that otherwise decent Governments - of Australia, of the United States and of my own country New Zealand - have for

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> 2. The dispute has arisen from the actions, recounted below, by which Australia has, in the view of Portugal, failed to observe, at least, the obligation to respect the duties and powers of the administering Power as mentioned in the preceding paragraph, the right of the people of East Timor to self-determination and the related rights, and Article 25 of the Charter; Australia by so doing has incurred international responsibility vis-a-vis both the people of East Timor and Portugal.
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> Those activities, shortly stated, have taken the form of the negotiation and conclusion by Australia with a third State of an agreement relating to the exploration and exploitation of the continetal shelf in the area of the "Timor Gap" and the negotiation, currently in progress, of the delimitation of that same shelf with that same third State.

Presumably, in spite of this effort to draft the pleadings in such a way as to emphasize Australia's breaches of international law rather than those of Indonesia, Australia will argue some variations on the theme that Indonesia is an indispensible party in the proceddings which should not therefore proceed. See generally Scobie

[20] See supra note. And see the excellent analysis in P. Escarameia, Formation of Concepts Under International Law: Subsumption Under Self-Determination in the Case of East Timor (unpublished S.J.D. dissertation, Harvard Law School, 1988).

[21] As the Department of Foreign Affairs and Trade put it, supra note, "[t]his recognition in no way implies approval of the circumstances of acquisition." And see infra note .

political reasons not been prepared to make the stand on this issue which I believe their own assessment of the facts should have required them to make. There are times when even one's friends should be called for acting wrongly and this is one of them!

IV. The Duty Not To Recognize the Acquisition of Territory Through Unlawful Force

In its simplest form, my argument is that, by entering into the Treaty, Australia breached an international obligation not to recognize the legitimacy of the Indonesian presence in East Timor. That obligation is reflected[22] in two unanimously adopted resolutions of the United Nations General Assembly, the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States,[23] and the 1974 Resolution entitled Definition of Aggression.[24] The 1970 resolution, adopted in celebration of the occasion of the twenty-fifth anniversary of the organization after a careful seven-year drafting period, provides that:

> The territory of a state shall not be the object of acquisition by another state resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.[25]

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[22] "Reflected" is chosen deliberately. See infra note.

[23] G.A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28), U.N. Doc. A/8028 (1970).

[24] G.A. Res. 3314, 29 U.N. GAOR, Supp. (No. 31) 142, U.N. Doc. A/9631 (1974).

[25] Declaration of Principles on Friendly Relations, supra note . The paragraphs are not numbered in this resolution.

The 1974 resolution is perhaps in narrower terms,[26] but in terms equally apposite to the Timor situation as characterized by the Security Council[27] and the General Assembly[28]:

> No territorial acquisition or special advantage resulting from aggression shall be recognized as lawful.[29]

This language is rather blunt and has an obligatory ring about it. One might have thought just from reading it that it carried some obligations with it, moral or even legal. Note the mandatory sounding "shall" in a context where less imperative requirements of the Friendly Relations instrument use the softer "should." Indeed, bearing in mind that the Australian Government was represented on, and participated actively in, the Committee that drafted the 1970 resolution - and was a co-sponsor when the draft reached the General Assembly itself - one might have expected some

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[26] The 1970 resolution speaks of "threat or use of force" while the 1974 one speaks of "aggression". In the context of the territories occupied by Israel, debate has been joined about whether territory can be properly acquired following a lawful use of force - as in self-defense. See, e.g., Halberstam, Recognition, Use of Force and the Legal Effect of United Nations Resolutions Under the Revised Restatement of the Foreign Relations Law of the United States, 19 Israel Law Review 495 (1984); J. Dugard, Recognition and the United Nations 156 (1987). Dugard goes so far as to contend that even acquisition following lawful force is contrary to principles of jus cogens (see infra). It is not necessary to pursue this line of debate since the Indonesian actions come within the core meaning of unlawful force condemned by both resolutions.

[27] In its resolutions calling for the withdrawal of Indonesian forces, S.C. Res. 384, 30 U.N. SCOR, Resolutions and Decisions 10, U.N. Doc. S/Res/384 (1975) and S.C. Res. 389, 31 SCOR, Resolutions and Decisions 18, U.N. Doc. S/Res/389 (1976).

[28] In its resolution G.A. Res. 3485 (XXX), 30 U.N. GAOR, Supp. (No. 34) 118, U.N. Doc. A/10034 (1975).

[29] Definition of Aggression, supra note, art. 5, para. 3.

embarrassment in ignoring it. But no, Senator Gareth Evans, a former law teacher and presently Minister for Foreign Affairs and Trade, has on several occasions denied the relevance of the Friendly Principles resolution. In response to a question from Senator McIntosh in the Australian Senate on 20 March 1986 he claimed that: "I make it plain that the legal status of [the friendly relations] declaration, which is not a treaty in any sense, has long been very hotly contested."[30] In the Senate on 1 November 1989, he said, repeating much of the language that he had used in 1986:

> ...[W]e have taken the view since 1979 that whatever the unhappy circumstances and indeed, possible illegality, surrounding Indonesia's acquisition of East Timor in the mid-1970s, Indonesian sovereignty over that territory should be accepted not only on a de factor [sic.] but on a de jure basis. There is no binding legal obligation not to recognise the acquisition of a territory that was acquired by force. Such a recognition does not, of course, imply approval of the circumstances of the acquisition. In international law the legality of the original acquisition of territory by a state has to be distinguished in subsequent dealings between the state acquiring that new territory and other states - in this instance, Australia.[31]

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[30] Hansard, Senate, 20 March 1986, at 1377.

[31] Hansard, Senate 1 November 1989, at 2702. I am puzzled by the last sentence (which also appears almost verbatim in other statements by the Minister). The way "distinguished" is used, it seems to suggest that the legality of the acquisition (why "original acquisition"?) is to be distinguished from something else but the fragment of the sentence that explains the something else has not been included. I take it that the something else is the way other states treat the title in later dealings. If this is what it means, then this sentence is a restatement of the basic point that there is no obligation to deny recognition to title acquired by aggression. This is the point that I dissent from in the text. If it means something different and is a distinct argument, I have missed it.

More recently, on 3 November 1990,[32] he added that "[t]his recognition does not mean that Australia condones the method of incorporation - on the contrary, the Government has been forthright in protesting the circumstances of incorporation."[33] I believe that the Senator is dead wrong on three fronts: he is wrong about the status of the Declaration being hotly contested; he is wrong about there being no legal obligation to comply with its requirement of non-recognition; and he is wrong in suggesting that his Government has paid its international dues once it "has been forthright in protesting the circumstances of incorporation"[34] - it has an obligation to go beyond that.

First, some discussion of the nature of General Assembly resolutions and their role in the creation of international law in general is necessary. Then it will be possible to say something about the two resolutions in particular. One starting point is

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[32] Statement by Senator Gareth Evans to Timor Gap Forum, Darwin, 3 November 1990 at 3.

[33] In light of this statement, which is part of a consistent pattern of Australian statements, Australia is surely precluded from now arguing that, contrary to the assessment of others, what the Indonesians did was perfectly legitimate. Had Australia from the start argued that the incorporation was legal, it could now, at least as a rhetorical posture, tough out the contrary assessment of others (including a majority of the General Assembly) and argue that, on the facts as Australia sees it, the norm of non-recognition does not apply. My position is simply that a state like Australia, acting in good faith <u>on the basis of its own assessment of the facts</u>, must apply the rule of non-recognition. Because of the clarity of the facts, Senator Evans has found it necessary to try to take the high ground and deny the legal status of the obligation.

[34] No doubt there are those who who dispute the forthrightness of the Australian protests.

clear. An effort during the drafting of the Charter to give the General Assembly a broad legislative power failed.[35] Moreover, Article 38 of the Statute of the International Court of Justice, which describes "international law" at least for the purposes of the jurisdiction of the Court and is widely regarded as useful more generally,[36] makes no reference to resolutions of international organizations amongst its "sources" of law. Article 13 of the United Nations Charter does, however, empower the General Assembly to "initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification." And Article 38 lists among its sources "international custom, as evidence of a general practice accepted by law." Customary law is said to comprise two elements, state practice and some indication that the practice is regarded by states as being legally obligatory rather than just coincidentally concordant.[37] Since this second element partakes some of the alchemist's art, it is usual to describe it in Latin as opinio juris, in the hope that this will sound more convincing. Traditionally (say before the latter part of the nineteenth century and the rise of international organizations) most state practice

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[35] A proposal to this effect (subject to further approval by a majority vote in the Security Council) by the Philippines was rejected 26-1 in Commission II at the 1945 San Francisco Conference. 9 UNCIO Docs. 316 (1945).

[36] Note the reference to it in Art. 83 of the 1982 Convention on the Law of the Sea, supra note.

[37] See generally C. Parry, The Sources and Evidences of International Law (1965).

and expression of opinio took place in a bilateral setting. But all that has changed, particularly with the dramatic alteration in the nature of diplomacy wrought by the birth of the United Nations and the membership in it of many new nations. Mow much more activity is multilateral.

Against this backdrop, assume that all the states of the United Nations (or even most of them) were to behave in a particular way, in pursuance of Article 13 of the Charter, by adopting a resolution espousing a particular point of international law, and that they were to express their opinio juris in that resolution, expressly or impliedly.[38] It must be the case that in some such situations this will pass muster as a contributor to custom, perhaps even a definitive contributor.[39] Suppose further that all of the parties to an international treaty, say the Charter of the United Nations, sit down and adopt fairly detailed rules spelling out the details of some of the general principles contained in the Charter. Might not this be fairly assimilated to

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[38] Article 13 of the Charter speaks both of "progressive development" and of "codification." Where a rule is in the fluid stage reasonable people might differ about whether its clarification amounts to mere codification or whether more is being done to develop it. My point about the Friendly Relations Declaration is that whether it codified or developed does not particularly matter. Whichever, development was complete by then.

[39] See Falk, On the Quasi-Legislative Competence of the General Assembly, 60 American Journal of International Law 782 (1966); and see generally American Law Institute, Restatement of the Law Third, The Foreign Relations Law of the United States Section 102, Comments b and c and Reporters' Note 2 (1987) and authorities there cited espousing the basic view suggested in the text.

the treaty itself?[40] Here, then, are two ways in which some resolutions, at least widely accepted ones might become "law" - either as custom or as an authentic interpretation of the Charter. With these thoughts in mind, let me return to the Friendly Relations Declaration, a document which asserts that it is concerned with the progressive development and codification of the principles addressed therein.[41]

To take first the matter of hot contest of the status of the Declaration. I have searched the literature in vain for this hot debate. We do not have the benefit of Senator Evans's sources for his assertion.[42] I thought that the obvious place to look was to

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[40] Unlike some constitutions that grant a power to make definitive interpretations of the constitution to a particular organ of government - typically the Supreme Court - the Charter is silent on who has the final power of interpretation. This means that, in the first instance at least, the General Assembly can make its own determination. See United Nations Conference on International Organization, Report of Rapporteur of Committee IV/2, San Francisco 1945, excerpted in R. Kirgis, International Organizations in their Legal Setting 382 (1977). If an organ such as the Assembly asks the Court for advice, the Court at least gives considerable weight to what the organ has done in the past. See Advisory Opinion on Legal Cobsequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16

[41] See the Declaration, supra note, preambular para. 17.

[42] It is believed that Professor Don Greig of the Australian National University gave the Government some unpublished advice on the matter. Laurie Ferguson M.H.R.'s efforts to obtain a copy were rebuffed. After some discussion about the benefits of the treaty for Australia "in terms of strengthening our ties with an important regional neighbour and providing an interim solution to a maritime boundary dispute" the departmental response continued: "You will appreciate therefore that it is Government policy not to make public any confidential and privileged legal advice which may have been prepared in relation to the treaty. The release of such material would be contrary to the national interests which the

see whether the Australian representatives involved in drafting the Declaration had placed some specific reservations about the whole exercise - or some substantial part of it - on the record. This was, however, not the case. The Australian representative on the Special Committee of 31 states that did the drafting stated on 1 May 1970 that "his delegation was pleased at the progress reflected in the draft declaration and paid a tribute to those who had contributed to its production. The task of the Committee had not been to amend the Charter but, in accordance with Article 13 [of the Charter], to elaborate some of its most important principles for the purpose of encouraging the progressive development and codification of international law."[43] He also made some remarks that must, in part at least,[44] have been aimed at Indonesia for its "confrontation" against Malaysia 1963-66 in which it used guerilla tactics to further territorial claims, efforts that Australia helped to overcome:

> The inclusion in the principle on the non-use of force of a paragraph stating that States had a duty to refrain from organizing or encouraging the organization of any form of irregular forces or armed bands was essential. So too, were references to the prohibition on organizing or participating in actions of civil strife in another State. These activities were unfortunately present in the area of which Australia

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Government is seeking to promote." Letter from Department of Foreign Affairs and Trade to Laurie Ferguson, Member for Reid, dated 6 September 1990.

[43] Report of the Special Committee on Principles of International Law Concerning Friendly Relations And Co-operation Among States, 25 U.N. GAOR, Supp. (No.18) at 104, U.N. Doc. A/8018 (1970).

[44] The remarks may also have been prompted in part by Australia's position in the Vietnam War.

> formed a part, namely in South East Asia, and were a breach of Article 2 (4) of the Charter.[45]

In this statement, the representative seems to be supporting the proposition (which does not seem to be disputed) that this part of the Declaration amounted to a spelling out of the broad generalities of Article 2, paragraph 4 of the Charter. He also, however, addressed himself in a vague way to the role of General Assembly resolutions more generally in creating international law. Singling out the sixteenth preambular paragraph of the Declaration,[46] he said:

> On preambular paragraph 16, the Australian view was that General Assembly resolutions were recommendatory and not binding upon Member States. Resolutions of the General Assembly could therefore play on [sic. only?] a limited role in relation to the interpretation of the declaration. There would be different ideas about which resolutions, or parts thereof, were relevant, and in any case they could not be understood as overriding or amending provisions of the Charter.[47]

This is hardly a vigorous attack on the legal status of the Declaration. It is addressed to the role of other instruments in interpreting the Declaration. Indeed, the statement seems to concede that the Declaration has some status but is aimed at preventing the Declaration from bootstrapping up some other

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[45] Id.

[46] Supra note. "Considering the provisions of the Charter as a whole and taking into account the role of relevant resolutions adopted by the competent organs of the United Nations relating to the content of the principles."

[47] Id. (Author's emphasis.) It appears from the Summary records of the Sixth Committeee of the General Assembly that Mr Brennan repeated the same speech for Australia on 23 September 1970. U.N. Doc. A/C.6/SR. 1178 at 8-9 (1970).

(unnamed and perhaps unknown) resolutions that the representative feared might surface to cause trouble. The argument goes to weight and relevance in particular cases and refers to other resolutions, not to the Declaration. And of course it is right. Some resolutions simply do not command the respect that the Friendly Relations one does and give less support to a law-making argument.

As vigor goes, however, it seems to have been the most vigorous assertion in the debates. A leading commentator on the Declaration is Robert Rosenstock, Adviser on Legal Affairs of the United States Mission to the United Nations - not a bold proponent of the law-making power of General Assembly resolutions. He makes the following comment, worth quoting at some length:

> There is some difference of opinion among Members of the United Nations as to whether the Declaration represents a mere recommendation[48] or a statement of binding legal rules. The truth would appear to lie somewhere between these two extremes, but closer to the latter. Two considerations point to the more limited view as to the effect of the adoption of the text on the state of international law. The first is that there is no difference in United Nations practice between the term "declaration" and "recommendation." Secondly, statements accepted by the San Francisco Conference limit to some extent the efficacy of efforts at interpretation other than through the amendment route. The principles involved, however, are acknowledged by all to be principles of the Charter. By accepting the respective texts, states have acknowledged that the principles represent their interpretations of the obligations of the Charter. The use of "should" rather than "shall" in those instances in which the Committee believed it was speaking de lege ferenda or stating mere desiderata further supports the view that the states involved intended to assert binding rules of law where they used language of

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[48] Here Rosenstock cites the Brennan statement in the Sixth Committee, supra note. In my view it is not even as strong as Rosenstock reads it, or even relevant since it is addressed to other resolutions.

firm obligation.[49]

Perhaps I was clutching at straws in an attempt to make Senator Evans's case. In any event, the death knell to the Evans argument about a hot contest - to say nothing of the legal status of the Declaration - is surely sounded by the decision of the International Court of Justice in the Case Concerning Military and Paramilitary Activities In and Against Nicaragua.[50] That case concerned the United States support of the contras who were fighting against the Nicaraguan government. Because of the jurisdictional stance of the case,[51] Nicaragua was not able to rely on arguments based on Article 2, paragraph 4 of the United Nations Charter and analagous provisions of the OAS Charter. Nicaragua was therefore constrained to make a customary law argument based in substantial part on the Declaration on Friendly Relations. After noting that both Nicaragua and the United States had accepted the treaty obligation to refrain from the use of force contained in

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[49] Rosenstock, The Declaration of Principles of International Law Concerning Friendly Relations: A Survey, 65 American Journal of International Law 713, 714-15 (footnotes omitted). The Indonesian representative was at the binding end of the spectrum. "He agreed with other delegations that the formulation of the seven principles was of a legal character and hoped that it would receive widespread support when it was considered by the General Assembly." U.N. Doc. A/C.6/SR.1182 at 33 (1970) (emphasis added) (Mr Rachmad for Indonesia).

[50] [1986] I.C.J. 14.

[51] The United States's 1946 acceptance of the jurisdiction excepted "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to the jurisdiction." The Court found that El Salvador, at least, was a party "affected." [1986] I.C.J. at 38.

Article 2, paragraph 4, the Court continued:

> The Court has however to be satisfied that there exists in customary international law an opinio juris as to the binding character of such abstention. This opinio juris may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles on International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.[52]

In short, Senator Evans's argument that legal status of the Declaration on Friendly Relations is hotly contested is a shaky one. In fact, there is strong authority that it represents a legal obligation. In the Nicaragua case, the Court was of course addressing itself to the basic rule on the non-use of force, rather than the corollary about the non-recognition of the fruits of illegal force. But the 1970 formulation came as a package and I can find no statements anywhere to the effect that some parts of the package are less obligatory than others.

Needless to say - and the reasoning of the International Court

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[52] [1986] I.C.J. at 89-90. (Author's emphasis.) The Court seems to have taken for granted that there was plenty of supporting state practice and that all that remained was the opinio problem. The Court went on to note the expression of the same principle in the resolution of the Sixth Annual Conference of American States condemning aggression (18 February 1928), the Montevideo Convention on Rights and Duties of States (26 December 1933) and the Helsinki Accords of 1975. In context, in referring to these items, the Court was addressing the opinio juris of the United States which this represented. Even if the opinio of such acts cannot be attributed to Australia there is certainly plenty of state practice represented in such events. Australia's opinio is demonstrated by the Charter itself and by Resolution 2625 (XXV).

of Justice seems to proceed on this basis[53] - the Friendly Relations Declaration's rule of non-recognition hardly made its first appearance in 1970 from nowhere. At most, the 1970 declaration put the seal on a development in international law that had been occurring over a half century.[54] Some have traced the doctrine back to Article 10 of the League of Nations Covenant;[55] some to the Kellogg-Briand Pact under which the parties renounced war as an instrument of national policy in their relations with one another.[56] Others emphasize Article 2, paragraph 4 of the United Nations Charter.[57] I would certainly rely upon the cumulative effect of much reiteration of the doctrine. Robert Langer asserted the existence of a legal obligation not to recognize territorial changes effected by force in his classic 1947 work on seizure of

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[53] Supra note.

[54] Which is why I chose the word "reflected" earlier to describe what the 1970 resolution does with the principle - the resolution merely crystallizes what had long been developing, if not developed.

[55] "The members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all the Members of the League. In case of any threat or danger of such aggression the Council should advise upon the means by which this obligation shall be fulfilled."

[56] Treaty Providing for the Renunciation of War as an Instrument of National Policy, done at Paris, 27 August 1928.

[57] "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

territory.[58] Ian Brownlie espoused a similar position in 1963.[59] Nor is the rule a dead letter in subsequent United Nations practice. In one of its resolutions on Iraq's invasion of Kuwait the Security Council insisted that "annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void." It called upon all states and international organizations, moreover, "not to recognize that annexation, and to refrain from any action or dealing that might

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[58] R. Langer, Seizure of Territory: The Stimson Doctrine and Related Principles in Legal Theory and Diplomatic Practice (1947). Langer refers, as state practice, notably to the Stimson notes on Manchuria to Japan and China on 7 January 1932 and the subsequent reaffirmations of the principles therein; the Resolution of the League of Nations Assembly of 11 March 1932, also on Manchuria; the Chaco Declaration of 3 August 1932 by 19 American republics asserting non-recognition of territory obtained by conquest; the Saavedra Lamas Anti-War Treaty of 10 October 1933; the Montevideo Convention on the Rights and Duties of States of 21 December 1933. Id., at 95. And see his discussion of Article 10 of the Covenant of the League of Nations and attempts to either amend or interpret it (depending on your point of view) so as to assert a rule of non-recognition, id., at 40-49.

[59] I. Brownlie, International Law and the Use of Force by States 418 (1963). And see J. Crawford, The Creation of States in International Law 106-107, 122-23, 418-19 (1979). Crawford speaks of a general principle that ex injuria jus non oritur. Much of the literature, and state practice, deals with non-recognition of the Soviet acquisition of the Baltic States. See, for example, A. Heino, Nonrecognition - Its Development in International Law and Application by the United States With Particular Reference to the Baltic States (unpublished Ph.D. thesis, New York University, 1965); Hough, The Annexation of the Baltic States and its Effect on the Development of Law Prohibiting Forcible Seizure of Territory, 6 New York Law School Journal of International and Comparative Law 301 (1985); K. Marek, Identity and Continuity of States in Public International Law 398-416, 551-587 (1968). On Australia's strange Baltic behavior, see infra note.

be interpreted as an indirect recognition of the annexation."[60]

Not wishing to belabor the point, I merely note that the repetition of the principle of non-recognition in the Resolution on Definition of Aggression in 1974[61] demonstrates no hot contest either. I have found no statements by Australia - or anyone else - disassociating themselves from it. Australia was a member of the Committee that labored for seven years on the drafting and co-sponsored the resolution when it was adopted by a unanimous General Assembly.[62] The relevant language of the Definition of Aggression is written in equally mandatory terms to the 1970 formulation, even if its field of application is arguably narrower in ways not

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[60] S/RES.662 (1990) adopted on 9 August 1990. I suppose that Australia might try to respond that the situations are different; the Security Council did not adopt such a resolution in the case of East Timor. The answer to this is that the obligation not to recognize arises from the general law - not from the Security Council resolution. In the case of Iraq, the political forces were such that it was possible for the Security Council to remind states of their obligations under the law. And see operative para. 5 of G.A. Res. 31/53, 31 U.N. GAOR, Supp. (No.29) 125, U.N. Doc. A/31/39 (1976) in which the General Assembly (Australia abstaining):

> Rejects the claim that East Timor has been integrated into Indonesia, inasmuch as the people of the territory have not been able to exercise freely their right to self-determination and independence.

The General Assembly spoke strongly for the international community.

[61] Supra note.

[62] U.N. Doc. A/C.6/SR.1502 at 227 (1974). According to the representative of Indonesia, Mr Wisnoemoerti:

> His delegation welcomed article 5, in particular the third paragraph, [the relevant provision of the definition which was quoted earlier in the text at note] which reaffirmed the principle of international law according to which any territorial acquisition resulting from the threat or use of force was inadmissible and should not be recognized.

U.N. Doc. A/C.6/SR.1482 at 110 (1974).

relevant in the present context.[63]

To summarize, the Australian Government had an international obligation not to recognize Indonesia's forcible acquisition of the territory of East Timor.[64] Merely being "forthright in protesting the circumstances of incorporation"[65] is not enough.

One might reasonably ask how I think Australia might have behaved differently. Plainly, from what I have said elsewhere about the utter illegality of the Indonesian position,[66] I think that the principled position for Australia to take was to refuse to deal with the Indonesians, even if this meant that the boundaries would not be delimited and the area in question would remain, for the foreseeable future, unexploited. There is nothing obviously obnoxious about leaving resources untapped for reasons of principle - consider the case of Antarctica, for instance, in respect of which Australia has played a leading protective role.

But let me, for the purposes of argument only, concede what

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[63] Supra note.

[64] In earlier writing, supra note 5, I made the point that Indonesia's action breached the separate norm of self-determination as well as the proscription of the use of force, and both points are made in the relevant Security Council and General Assembly resolutions deploring the Indonesian military intervention. One can probably argue that international law also requires that such a denial of self-determination independently requires non-recognition also, but the point is not as developed in this form in state practice and in the literature. In view of the strength of the case concerning use of force, it is not necessary to pursue the point for the purposes of the present analysis. See also infra on self determination and jus cogens.

[65] Senator Evans, supra note.

[66] Supra note.

I believe is the kernel of the Australian position: at some point it is necessary to "get on with it" and accept that the Indonesians are in control and that they have to be dealt with to some degree. There is, indeed, some force to the argument thus stated. Assume, for instance, that it is necessary to deal with the Indonesians to make humanitarian arrangements for refugees; assume that a question arises in an Australian court or even in an international tribunal about the validity of a marriage (or divorce) or the registration of a birth performed by Indonesian authorities in East Timor after the takeover. It is probably the case that some exceptions to the general rule will be made. The hard question is where to draw the lines.[67] The Advisory Opinion of the International Court of Justice on Namibia, a comparable case of illegal occupation, indicates that such exceptions must be narrowly drawn.[68]

How might that line of reasoning cut in respect of the Timor Gap? I suggest that at the very least it indicates that if some

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[67] See Blix, Contemporary Aspects of Recognition 130 Receuil des Cours 589, 662-65 (1970).

[68] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16, 56:

> In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.

See to the same efect the discussion by the Privy Council in Madzimbomuto v. Lardner-Burke [1968] 3 All Eng. Rep. 561 (illegal Rhodesian regime).

treaty arrangement has to be made, it must be one which itself asserts the basic non-recognition point and reserves a position on it. Apparently no attempt was made to do this. The Australian authorities conceded from early in the negotiations that dealing with the Indonesians on the issue required that they accept and recognize Indonesian sovereignty de jure.[69] Yet why should this be so? And where is the authority for this position in international law? Surely it is not beyond the wit of the diplomatic mind to say something like "I am dealing with you because necessity demands, but I do not thereby concede your legitimacy." The case for asserting that the act of entering the

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[69] The concession appears to have taken place as early as February 1979. See, e.g., statement by Senator Evans Australian Hansard, Senate, 18 October 1988 at 1525. I have yet to be persuaded of the inevitability of this position that beginning negotiations implies or requires de jure recognition. I do not see why as a legal/diplomatic position Australia's negotiators could not have dealt with Indonesia insisting that they were conceding - at most - de facto but not de jure control. Plenty of negotiations have taken place over the years with the governments of the two Chinas by states which reserved their position on recognition. Much modern state practice (but not apparently Australia's) downplays the difficult distinction between de facto and de jure recognition, and indeed formal recognition in general. The distinction has always seemed to be one of degree with de jure coming after some significant passage of time has indicated a greater degree of permanency. De jure recognition, because of its name inevitably carries with it some connotation of prescriptive legitimacy. The absolutely weakest possible interpretation of the non-recognition principle is that it forbids explicitly granting de jure recognition. (See Blix, supra note at 664: "It is believed that this formula [in the 1970 Declaration] may be interpreted to mean that no formal admission may be made of the legality of a forcible acquisition as described." (Emphasis in original.)) This would permit some accomodation of the aggressor but make the point. Obviously, I think the obligation goes beyond that. On Australia's (shifting) recognition policy, including its unique recognition and de-recognition of the Soviet Union's de jure sovereignty over the Baltic states, see Suter, Australia's New Policy on Recognizing Governments, 61 The Australian Quarterly 59 (1989).

deal amounts to recognition is stronger when the completed treaty is signed or ratified, and this one certainly concedes the Indonesian position. But did it need to? Indeed, the Indonesians apparently went out of their way to rub the Australian negotiators' noses in the Indonesian position. Note the title of the Treaty: it refers to "An Area Between the Indonesian Province of East Timor and Northern Australia." If Australia objects to the mode of incorporation, why not insist all along on a formula such as "the territory currently under the de facto control of Indonesia"[70] or something of that ilk. I am certainly not privy to any departmental material on the drafting history of the Timor Gap Treaty, but it does seem to me that the Australian negotiators fell over themselves to accomodate the Indonesian position on incorporation right from the start. Even accepting their premise that some deal had to be cut, I am not persuaded that it was lawful

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[70] I have in mind the language of the Boundary Agreement between China and Pakistan of 2 March 1963 which admits that India (and possibly the Kashmiris themselves) may have some claims to the area in question, by speaking of "the alignment of the boundary between China's Sinkiang and the contiguous areas the defence of which is under the actual control of Pakistan." Text in 2 International Legal Materials 541 (1963). Article Six of the treaty reads:

> The two Parties have agreed that after the settlement of the Kashmir dispute between Pakistan and India, the sovereign authority concerned will re-open negotiations with the Government of the People's Republic of China, on the boundary, as described in Article Two of the present Agreement, of Kashmir, so as to sign a Boundary Treaty to replace the present Agreement.
>
> Provided that in the event of that sovereign authority being Pakistan, the provisions of this Agreement and of the aforesaid protocol shall be maintained in the formal Boundary Treaty to be signed between Pakistan and the People's Republic of China.

to cut one that gives away so much on the recognition point.[71]

Moreover, when the Treaty shares out the proceeds of exploitation of the area, why did Australia not insist on putting some of its share - Indonesia's too - in a trust fund for the people of East Timor? In a 1990 speech, Senator Evans commented that the Australian recognition of the Indonesian incorporation means that "Australia has been able to work together constructively and effectively with the Indonesian authorities in improving the economic situation of the people of East Timor."[72] I take it that this is not a contention that the profits from the exploitation of

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[71] There is one other possible line of inquiry as to this aspect of the situation. The Treaty is "provisional" pending a final agreement on the delimitation of the continental shelf. It will last, however, for a minimum of 40 years. See the first preambular paragraph and Article 33 of the Treaty. In an article in Backgrounder magazine, Vol. 1, No. 8 on 23 February 1990, Australia Rejects Portuguese Criticism of Timor Gap Treaty, the Australian Department of Foreign Affairs and Trade emphasized this provisional point. The Department commented:

> The treaty itself contains provisions to the effect that it will not prejudice the position of either Australia or Indonesia in respect of permanent delimitation of the continental shelf in the Zone of Cooperation. Therefore Australia does not concede that any sovereign rights over seabed resources that appertain to the land mass of East Timor in fact extend into the Zone of Cooperation.
>
> The assertion that the people of East Timor have permanent sovereign rights over the seabed resources in the Zone of Cooperation is not accepted by Australia. Consistent with this position is the fact that Australia had never conceded, prior to 1975, any Portuguese interest in the area of seabed forming part of the Zone of Cooperation.

In short, the interim nature of the solution is not meant as a device to protect the rights of the people of East Timor, if any. They are cut out of the deal. Again, it should have been possible to draft language which expressly protected the position of an eventually separate East Timor - even while disagreeing about what its legal rights might be - but this was not done.

[72] Statement to Timor Gap Forum supra note.

the area will flow - or even trickle - inexorably down to the people of Timor as a matter of treaty obligation, although some may in practice. It is true that the Treaty refers to the desire of the Governments to "cooperate further for the mutual benefit of their peoples in the development of the resources of the area"[73] and to taking appropriate measures to ensure that preference is given in employment in Area A to nationals and permanent residents of Australia and the Republic of Indonesia."[74] But "Indonesia" here probably means "Jakarta" - there is not a word in it about anything for the people of Timor. Why should not one or both of the parties to the Treaty be earmarking some of the proceeds for the people of East Timor?

VI. The Treaty is Null and Void

I come then to the point that the Timor Gap Treaty may be regarded as a nullity under international law. Now there is a fairly fundamental assumption, but I think a correct one, in what follows. It is that if Australia and the legitimate sovereign over East Timor were to embark on a judicial or arbitral delimitation of the three areas,[75] it is unlikely that Australia would be held

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[73] Treaty, preambular para. 5.

[74] Treaty, operative para. 24.

[75] Article 83 of the United Nations Convention on the Law of the Sea, on the delimitation of the continental shelf between states with opposite or adjacent coasts, speaks of achieving "an equitable solution" on the basis of international law. There is much learning and numerous instances determined by third-party dispute-settlement procedures but the outcome in a particular case is not highly predictable. Many of the authorities are mentioned in Cook, supra note.

to be entitled to the whole of areas A, B and C. My guess is that it would succeed in respect of Area B and some, but not all, of Area A and probably none of Area C. If it were to win in respect of all three areas, my argument about recognition, while it would be applicable to the actual territory of East Timor, would be irrelevant in respect of territory that by virtue of the delimitation would belong to Australia. Australia is presumably entitled to give away some of its own resources to its good neighbor. My contention of course is that, far from giving away its own resources, it is engaged with an aggressor in sharing out somebody else's. The Timor Gap Treaty, in some significant part at least, shares resources obtained by aggression, even if, in the basence of a final delimitation, one cannot be sure exactly which part this is.

There are at least two lines of argument why I believe this effort to be null and void. I shall call them the "Nemo Dat" and "Jus Cogens" arguments. They both lead inexorably to the same conclusion.

(i) Nemo dat quod non habet

Ian Brownlie in his leading text on public international law notes that the maxim Nemo dat quod non habet, the principle that you cannot give a better title than you have, is a "familiar feature of English commercial law, and the principle which the maxim represents is undoubtedly a part of international law."[76] A

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[76] I Brownlie, Principles of Public International Law 125 (4th ed. 1990). Brownlie refers to the Island of Palmas case (Netherlands v. U.S.) 2 Reports of International Arbitral Awards

domestic law analogy helps to grasp the point. I buy your car from a thief. You find me in possession of it. You are entitled to it back and I am left with trying to get my purchase price back from the thief. This is true whether I know or do not know of the circumstances of the thief's acquisition. The thief gets no title and I cannot get a good title through the thief. Notice that in domestic law my legal problems get potentially worse, much worse, if it can be shown that I know of the thief's thievery. Then I may be a receiver of stolen property or an accessory after the fact. I would thus be liable to criminal sanctions as well as being liable to suit in tort or delict.[77] Australia seems to be in this worse position since it has known the circumstances all along. But it does not seem necessary to pursue the argument that far. On any theory, it cannot get a good title through the bad Indonesian one.

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829 (1928). The Arbitrator held that Spain could transfer no more territorial rights under the 1898 Treaty of Paris than she herself had. In particular Spain could not transfer Dutch territory forming part of the Netherlands Indies (now Indonesia).

[77] I have not explored this line of thought in depth into the international area but it leads quickly into two other bodies of material that at least characterize the Indonesian effort. (1) The invasion was an international crime as understood in the Nuremberg Principles, in Article 19 of the International Law Commission's draft Articles on State Responsibility, Report of the International Law Commission on the Work of its Twenty-Eighth Session, 31 U.N. GAOR, Supp. (No. 10) 174, U.N. Doc. A/31/10 (1976), and in Art. 15 of the Draft Code of Offenses Against the Peace and Security of Mankind (1991). (2) The invasion was a breach of an obligation erga omnes, as that concept was floated by the dicta in the I.C.J.'s Barcelona Traction Judgment, [1970] I.C.J. 4, 32 which lists "acts of aggression" as one of the breaches of rights which, in view of their importance, all states can be said to have a legal interest in their protection. Does this mean that someone other than Portugal or the Timorese can enforce against Indonesia the right of East Timor not to be forcibly taken off the map? Where does this lead on a complicity argument with Australia?

ii Jus cogens

The alternative argument[78] is the jus cogens one. Article 53 of the Vienna Convention on the Law of Treaties (a treaty to which Australia acceded without reservation in 1974) provides for what it calls Treaties Conflicting with a Peremptory Norm of General International Law (Jus Cogens):

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be nodified only by a subsequent norm of general international law having the same character.[79]

The exact scope of Article 53 is disputed, notably the categories of breaches of international law to which it applies. One thing though is stunning: the basic Charter/Friendly Relations Declaration rule proscribing the use of force is on every significant commentator's agreed list of what are the jus cogens norms, starting with the Commentary by the International Law Commission which drafted the Convention.[80]

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[78] I do not wish to overstate the distinctiveness of the two arguments - they may well be essentially alternative modes of expressing the same point.

[79] Vienna Convention on the Law of Treaties, art. 53, U.N. Doc. A/CONF.39/27 (1969).

[80] [1966] 2 Year Book of the International Law Commission 247. And see the most comprehensive discussion of the topic to date L. Hannikainen, Peremptory Norms (Jus Cogens) in International Law 163-64, 323-56 (1988). And see Crawford, supra note, at 81. The right to self determination is listed by many scholars as a norm of jus cogens. See Hannikainen at 357-424. But see Crawford, id. And see G.A. Res. 35/118 (1980), the Plan of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, in para. 5 of which the General

If Australia were to enter into an arrangement with Indonesia to jointly invade and take over the territory of East Timor, that agreement would clearly be void under the peremptory norm doctrine. I think the logic of the argument is that the same result follows if the territory is shared out after the invasion, even if Australia had completely clean hands at the point of conquest.

VI. Conclusion

Now the way in which Australia has tried to avoid the application of one or other of these arguments is by suggesting that its recognition of Indonesian title gets it off the hook. In my humble submission this will simply not fly, for the reasons I suggested earlier in the paper. The sleight of hand in trying to avoid the problem by "recognizing" Indonesia's title will not work under the modern international law which Australia itself helped to create. The recognition itself is void!

Assembly:

> Categorically rejects any agreement, arrangement or unilateral action by colonial and racist Powers which ignores, violates, denies or conflicts with the inalienable rights of peoples under colonial domination to self-determination and independence.

Thus the right to self determination of the Timorese supports a separate argument for the treaty being void. While Portugal's case in the International Court, supra note, stresses the self determination aspects of the case, it does not go as far as to argue the invalidity of the Timor Gap Treaty.